BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAMELA HENDRIX	)	
Claimant	)	
	)	
VS.	)	
	)	
HCR MANOR CARE HEALTH SERVICES	)	
Respondent	)	Docket No. **1,056,253**
	)	
AND	)	
	)	
INS. CO. OF THE STATE OF PA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the March 29, 2012 Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Michael J. Patton, of Topeka, Kansas, appeared for claimant. Donald J. Fritschie, of Overland Park, Kansas, appeared for the respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript with exhibits taken March 27, 2012, and all pleadings contained in the administrative file.

ISSUES

The claimant alleged she suffered repetitive traumas to her bilateral hands and wrists performing her job as a cook for respondent. Respondent argued claimant failed to meet her burden of proof that the alleged repetitive trauma was the prevailing factor causing the injury, medical condition and resulting disability or impairment. The Administrative Law Judge (ALJ) found that claimant failed to meet her burden of proof that she suffered personal injury by accident arising out of and in the course of her employment. The ALJ noted that the preponderance of the evidence failed to establish that the prevailing factor for claimant's hand injury was her work.

Claimant requests review of whether her accidental injury arose out of and in the course of her employment and whether the prevailing factor causing claimant's hand condition was her job duties with respondent.

Respondent argues that claimant failed to sustain her burden of proof that her injuries arose out of and in the course of employment with respondent and, therefore, the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a cook for respondent since May 2010. She worked approximately 36 to 40 hours a week. Her job duties included chopping a lot of food, whipping potatoes and gravy, slicing meat and serving food repetitively every day. Claimant testified that she began experiencing pain in her hands and wrists which got worse in December 2010. She reported to her supervisor, Christine Nievar, that her hands and wrists were causing her pain. But she was not referred for treatment.

Claimant suffered an injury to her left index finger when a box of frozen chicken fell on her hand crushing her left index finger. She began treatment with Dr. Marc Baraban on February 4, 2011. Claimant testified that she decided to wait to seek treatment for her bilateral hands and wrists complaints until after the treatment for her finger.

On May 19, 2011, claimant was first examined and evaluated regarding her carpal tunnel complaints. Claimant was examined and evaluated by Dr. Laurel Vogt. The doctor diagnosed claimant with bilateral wrist pain. Upon physical examination, Dr. Vogt found claimant's wrists were both tender and noted mild thenar atrophy as well as bilateral positive Tinel's and Phalen's signs. The doctor recommended bilateral universal wrist splints to be worn at night and also at work. A nerve conduction test was ordered and claimant was referred to a hand specialist. Claimant was placed on a 5-pound weight restriction.

Dr. Vogt's report noted that approximately 20 years ago, claimant had bilateral carpal tunnel surgery performed by Dr. Baraban. Then roughly 12 years ago, Dr. Ketchum performed surgery on claimant's left hand.

Jean Noble, respondent's human resources director, testified that claimant had been saying for a long time that she was going to resign and move. So on May 19, 2011, Ms. Noble took a document to claimant that indicated claimant was going to resign on June 9, 2011, which claimant signed. Ms. Noble testified:

> Q. You've heard her testimony today that she had a conversation with you in which you demanded her resignation. Did you hear her testify as to that?
>
> A. Yes.

> Q. Can I ask you to comment on that testimony?
>
> A. She had been telling us all along or for a long time that she was going to resign and move, and I told her it had to be in writing, that we had to have -- we couldn't take it seriously unless we had it in writing, and so she finally put it in writing and signed it and gave it to us.[1]

Claimant testified that Ms. Noble had demanded her resignation. But that same day claimant also signed a document which indicated that respondent would accommodate her restrictions. And claimant continued working until after an automobile accident on June 5, 2011.

On October 11, 2011, claimant was examined and evaluated by Dr. Anne Rosenthal at the request of respondent. Claimant told Dr. Rosenthal that after her previous carpal tunnel releases her hands had been excellent. And claimant further told Dr. Rosenthal that she avoids any repetitious handwork because she did not want to get carpal tunnel again. After examining claimant Dr. Rosenthal opined, in part:

> Her current complaints are not consistent with carpal tunnel syndrome. Numbness in a glove-like pattern that she has in both upper extremities cannot come from the carpal tunnel since carpal tunnel syndrome numbness can only be distal to the carpal tunnel, which would include the thumb, index, long, and ring finger, and in some people depending on their anatomy, part of the small finger as well. I do want to point out that her Semmes-Weistein testing is completely normal, which shows that although she may complain of subjective numbness, objectively she has normal sensation in both of her hands.[2]

Dr. Rosenthal went on to note that claimant's complaints of radiating pain in both of her arms does not follow any anatomic distribution. Dr. Rosenthal further noted that an EMG/NCV of both upper extremities would be necessary and the doctor further wanted to review claimant's medical records regarding claimant's previous carpal tunnel releases. Finally, Dr. Rosenthal concluded that there was no evidence of an intrinsic wrist problem causing claimant's symptoms in either arm.

On February 3, 2012, Dr. E. Owen Martinez performed a bilateral EMG/NCV study on claimant's bilateral upper extremities. The doctor noted claimant had bilateral carpal tunnel release approximately 20 years ago and that her symptoms had improved after the surgery until recently. The doctor noted the current study was consistent with bilateral carpal tunnel syndrome.

---

[1] P.H. Trans. at 36-37.

[2] *Id.*, Ex. 1.

Dr. Rosenthal then reviewed the EMG/NCV test results and concluded the very mild borderline changes were consistent with claimant's previous carpal tunnel releases as she noted the numbers were not expected to normalize after carpal tunnel release. Dr. Rosenthal opined claimant did not have carpal tunnel syndrome and her thumb pain on the right was caused by degenerative joint disease which was not vocationally related. Dr. Rosenthal concluded there was no anatomic explanation for claimant's glove-like numbness and global upper extremity pain.

At the time of the preliminary hearing, claimant was still experiencing pain in her hands and wrists. She testified that her pain continued to increase after she stopped working for respondent.

Claimant alleged that she suffered work-related repetitive trauma that resulted in an onset of bilateral carpal tunnel syndrome. K.S.A. 2011 Supp. 44-508(f) provides:

> (f) (1) 'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
>
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
>
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) provides:

> (g) 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The ALJ analyzed the evidence and concluded:

> It has not been established by a preponderance of the evidence that the prevailing factor for Claimant's bilateral hand complaints is work related. Dr. Rosenthal did not find Claimant had carpal tunnel and had no explanation as to the cause of Claimant's symptoms. Dr. Martinez did diagnose Claimant with carpal tunnel but did not attribute that condition to Claimant's job. Lastly, Claimant had had carpal tunnel before this job and an aggravation of that condition is also an explanation. For these reasons it is found that Claimant's job duties were not the prevailing factor for Claimant's bilateral hand condition.

This Board member agrees and affirms. Moreover, it should be noted that although claimant testified her job required repetitive use of her hands, when she provided a history to Dr. Rosenthal she stated that she avoided repetitious hand activity because she did not want a recurrence of her carpal tunnel condition. And during her treatment with Dr. Baraban for her injured finger she never mentioned any other ongoing problems with her wrists and hands.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[4]

WHEREFORE, it is the finding of this Board Member that the Preliminary Hearing Order of ALJ Rebecca Sanders dated March 29, 2012, is affirmed.

IT IS SO ORDERED.

Dated this 25th day of May, 2012.

_____
HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Michael J. Patton, Attorney for Claimant, michaelp35@gmail.com
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier, dfritschie@wallacesaunders.com
Rebecca Sanders, Administrative Law Judge

[3] K.S.A. 44-534a.

[4] K.S.A. 2011 Supp. 44-555c(k).